No. 76-1796

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT E. OTTOBONI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1-18) is reported at 549 F. 2d 1271. The opinion of the district court (Pet. App. B, pp. 19-43) is reported at 369 F. Supp. 1289.

JURISDICTION

The judgment of the court of appeals (omitted from petitioners' appendix) was entered on January 31, 1977, and timely petitions for rehearing and suggestions for rehearing *en banc* were denied on March 23, 1977 (Pet. App. C, p. 44). The petition for a writ of certiorari was filed on June 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the mineral reservation in patents issued pursuant to the Stock-Raising Homestead Act of 1916 reserved geothermal resources to the United States.

STATUTES INVOLVED

Sections 1, 2, 3, and 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 862-863, 864, as amended, 43 U.S.C. 291, 292, 293, and 299, respectively, are reproduced in the petition at 3-4.

STATEMENT

This case concerns the construction of the mineral reservation to the United States of "all the coal and other minerals" contained in Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. 299, and in patents issued pursuant to the Act.

The Stock-Raising Homestead Act applies only to the public domain designated by the Secretary of the Interior as "stock-raising lands," *i.e.*, lands the surface of which is chiefly valuable for grazing and raising forage crops, without merchantable timber, not susceptible of irrigation, and of such character that 640 acres are required to support a family. Section 2, 43 U.S.C. 292. To obtain a patent, the entryman is required to make improvements for "stock-raising purposes." Section 3, 43 U.S.C. 293. Patents issued under the Act contain a reservation to the United States of "all the coal and other minerals in the lands," which are subject to disposal by the United States in accordance with the mineral laws in force at the time of such disposal. Section 9, 43 U.S.C. 299.

The petitioners are the owners, or the lessees of owners, of lands in Sonoma County, California, which were patented under the Stock-Raising Homestead Act (Pet. App. A, p. 2).

Their patents contained a reservation to the United States pursuant to Section 9 of the Act (Pet. App. A, pp. 2-3). Geothermal steam is present beneath these lands (*id.* at 2).

In 1960 the first geothermal electric power plant went into operation in the area known as the Geysers, near petitioners' lands (Pet. App. B, p. 31). As development continued in the area, petitioners' lands were considered for production of the geothermal resources. As a result, various inquiries were made of the Department of the Interior to determine whether geothermal resources were subject to disposition under the federal mining laws or the mineral leasing laws, or whether geothermal resources were reserved to the United States under the provisions of the Stock-Raising Homestead Act.

In response to an inquiry with regard to the Stock-Raising Homestead Act, by letters dated December 16, 1965, the Deputy Solicitor of the Department of the Interior concluded that geothermal steam was merely water and, as such, was not subject to the mineral reservation[1] (Pet. App. B, pp. 38-43). With regard to the other inquiries concerning disposition under other laws, the Department of the Interior concluded that geothermal resources were not subject to disposition (*id.* at 36). Therefore, new legislation for the leasing of geothermal resources was necessary.

At the congressional hearings involving geothermal leasing legislation, a controversy developed over the legal conclusion of the Department of the Interior that geothermal steam was not reserved to the United States under the Stock-Raising Homestead Act. Congress decided to leave

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[1]Whatever the force of the 1965 letters, the Department of the Interior has authorized us to state that it is now of the view that geothermal steam is included in the mineral reservations in question.

the question to judicial resolution (Pet. App. A, pp. 16-17). Accordingly, in enacting the Geothermal Steam Act of 1970, 84 Stat. 1566, 30 U.S.C. 1001 *et seq.*, Congress directed the Attorney General to institute a proceeding to quiet title to lands in which the government had reserved the minerals when geothermal development was imminent, with the proviso that this duty would cease upon an "authoritative judicial determination" that the reservation did not include the geothermal resources. Section 21(b), 30 U.S.C. 1020(b). On October 13, 1972, the Attorney General filed this action. The government contended that Congress in its use of the term "other minerals" intended to reserve all natural resources in the subsurface estate for future development for the public benefit.

The district court ruled that the mineral reservation did not include geothermal resources, reasoning that the patents conveyed title to the land, not just use of the surface; that superheated water, the main constituent of geothermal energy, is not a mineral within the meaning of the reservation; and that the opinion of the Department of the Interior was entitled to great weight (Pet. App. B, pp. 22-37).

The court of appeals reversed (Pet. App. A, pp. 1-18). Reviewing the background of the Act, its legislative history, and the language of the Act itself, the court of appeals concluded that the purposes of the Stock-Raising Homestead Act were to provide homesteaders a portion of the public domain sufficient to enable them to support their families by raising livestock and to reserve unrelated subsurface resources, particularly energy resources, for separate disposition by the United States. From this the court of appeals reasoned that the purposes of the Act would best be served by interpreting the statutory mineral reservation as including geothermal resources.

ARGUMENT

The decision of the court of appeals is correct, involves no conflict with decisions of other courts of appeals or of this Court, and presents no issue warranting review by this Court.

1. The court of appeals, contrary to petitioners' assertions (Pet. 14-23), based its conclusion on the language of the Act construed in the light of the events which led to its passage and the legislative history, including both the committee reports and the floor debates.

As the court of appeals recognized, the Stock-Raising Homestead Act was enacted to allow separate development of public lands for both agriculture and the production of subsurface fuels. As early as 1907 President Roosevelt recommended that Congress enact "such legislation as would provide for title to and development of the surface land as separate and distinct from the right to the underlying mineral fuels * * * and the disposal of these mineral fuels * * * to the benefit of the public as a whole." 41 Cong. Rec. 2806 (1907).[2] This theme was repeated in 1909 by the Secretary of the Interior, who urged "separating the right to mine from the title to the soil." 1909 Department of the Interior Annual Report, pt. I, p. 7. In the same year

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[2]Petitioners contend that the court of appeals used "spurious 'legislative history,'" because it is the legislation actually adopted, not the proposals of advocates of certain positions—such as the Department of the Interior—that is critical (Pet. 23-26). Here, however, the background of the Stock-Raising Homestead Act is clearly relevant, since the court of appeals concluded that Congress' purpose in enacting the mineral reservation in the Act was "to implement the principle urged by the Department of Interior and retain governmental control of subsurface fuel sources, appropriate for purposes other than stock raising or forage farming" (Pet. App. A, p. 9).

Congress enacted the first of several statutes providing for the sale of lands with the reservation to the United States of specified minerals. Act of March 3, 1909, 35 Stat. 844, 30 U.S.C. 81.

Against this background, Congress enacted the Stock-Raising Homestead Act, which applied only to areas designated as lands "the surface of which is, in [the Secretary of the Interior's] opinion, chiefly valuable for grazing and raising forage crops * * *." Section 2, 43 U.S.C. 292. All entries made and patents issued under this Act must "contain a reservation to the United States of all the coal and other minerals in the lands." Section 9, 43 U.S.C. 299. The House report stated that the purpose of this reservation was "to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof." H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916). Additionally, both the House and Senate committee reports expressly noted the Department of the Interior's statement that, "[t]he farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land." H. R. Rep. No. 35, *supra*, at 5; S. Rep. No. 348, 64th Cong., 1st Sess. 2 (1916). The floor debate also emphasized the limited nature of grants under the Act. See Pet. App. A, pp. 11-14.

After reviewing this legislative history, the court of appeals concluded (Pet. App. A, pp. 14-15):

> This review of the legislative history demonstrates that the purposes of the Act were to provide homesteaders with a portion of the public domain sufficient to enable them to support their families by raising livestock, and to reserve unrelated subsurface resources, particularly energy sources, for separate disposition. This is not to say that patentees under the Act were granted no more than a permit to graze livestock, as under the Taylor-Grazing Act, 43 U.S.C. §§315 *et seq.* To the contrary, a patentee under the Stock-Raising Homestead Act receives title to all rights in the land not reserved. It does mean, however, that the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership. The purposes of the Act will be served by including geothermal resources in the statute's reservation of "all the coal and other minerals." Since the words employed are broad enough to encompass this result, the Act should be so interpreted.

In our view, the appellate court was correct in assimilating geothermal resources to other energy-producing minerals. Unlike well water, which *would* help support stock-raising, the geothermal resources involved here are wholly irrelevant to the purpose for which patents were issued under this homestead statute. Indeed, in this case, the homesteaders have leased their lands to others for development of the geothermal resources as a wholly separate commercial venture. While an unanticipated use of the surface is permissible, it would be going too far to condone exploitation of subsurface resources plainly beyond the contem-

plation of those who drafted the Stock Raising Homestead Act in order to allocate otherwise apparently unuseable lands for the specific purpose of raising livestock.

2. Petitioners contend, however, that the provision in the Geothermal Steam Act of 1970 for an "authoritative judicial determination" of the ownership of geothermal energy resources, 30 U.S.C. 1020(b), requires Supreme Court review of this case (Pet. 10-13).

Petitioners do not contend that Congress expressly provided that there should be Supreme Court review of the scope of mineral reservations under the Stock-Raising Homestead Act, and the legislative history upon which they rely indicates only that Congress sought to ensure that there would be a judicial—as opposed to an administrative—determination of the scope of the reservation to the United States, since the latter would not be "authoritative" (H.R. Rep. No. 1544, 91st Cong., 2d Sess. 8 (1970)):

> As the opinion of the Department [of the Interior] is not a conclusive determination of the legal question, it was the sense of the committee that an early judicial determination of this question (upon which the committee takes no position) is necessary.

The decision of the court of appeals in this case provides an authoritative judicial determination. As petitioners emphasize (Pet. 12-13), virtually all the land known or believed to have the potential for geothermal development is located within the Ninth Circuit. The decision of the court of appeals in this case, if allowed to stand, will thus conclusively[3] determine the scope of the mineral reservation

[3]The Ninth Circuit denied petitioners' petitions for rehearing and suggestions for *en banc* rehearing, the order reciting, "[t]he full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc" (Pet. App. C, p. 44).

in the patents for these lands. Congess' purpose in enacting Section 21(b), 30 U.S.C. 1020(b), which was to ensure that questions regarding ownership would not retard the development of geothermal resources (H.R. Rep. No. 1544, *supra*, at 8) is thus fully satisfied by the court of appeals' opinion in this case, and further review by this Court is not warranted. For future grants, of course, the question is settled by the Geothermal Steam Act of 1970. See Section 25, 30 U.S.C. 1024.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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